

1994 Ky. Op. Atty. Gen. 2-40, Ky. OAG 94-15, 1994 WL 109069 (Ky.A.G.)

Office of the Attorney General  
Commonwealth of Kentucky

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March 4, 1994

Re: Whether County Clerk May Procure Health Insurance Solely for Clerk from Excess Fees, etc. AGO Corr. No. 93-(O)-1334.

Hon. J. Michael Noyes  
Director

Dear Mr. Noyes:

By letter of September 17, 1993, you indicate, in substance, that the Auditor of Public Accounts and the Graves County Clerk desire an opinion regarding the meaning of [KRS 79.080](#), [KRS 61.405](#), and [KRS 64.530](#), in relation to whether the county clerk may pay the cost of health insurance, for the clerk alone (and not for other employees of the county clerk's office), from excess fees of the office.

Your letter poses five specific questions related to the basic question recited above. Three of them are questions the Auditor wants answers to. Two are questions posed to the Auditor's Office by the private counsel for the Graves County Clerk.

Auditor's Questions

(1) Can an elected county fee official provide hospitalization insurance benefits to the fee official from excess fees without providing the same benefits to the employees of the county fee official?

In our view the answer is no. Discussion follows.

As discussed in OAG 94-11 (copy enclosed), the only "entitlement" of the county clerk to what might be termed a "personal allocation" of monies (e.g., payment of the cost of health or medical benefit costs) from the fees of the office, is to his or her annual salary payable from such fees pursuant to [KRS 64.535](#).

Other than the amount the county clerk is personally entitled to from the statutory fees of the office pursuant to [KRS 64.535](#), monies paid from the fees of the office must be expended for official expenses of the office.

Whether a given expenditure is "official" in nature will be judged based upon whether the expense is official rather than personal in nature. See [Funk v. Milliken, Ky., 317 S.W.2d 499, 506 \(1958\)](#), wherein the court, in addressing the nature of expenses that may be properly charged as an expense of an office, said:

In more recent years, ... this Court has adopted the view that credit may be allowed for expenses that are reasonable in amount, beneficial to the public, and not predominantly personal to the officer in the sense that by common understanding and practice they are considered to be personal expenses.

An expenditure of funds from fees of the county clerk's office, to provide health or medical insurance uniquely for the clerk, and not in connection with a governmental program providing such benefits to all county employees, obviously would be for a purpose personal in nature to the clerk. Such expense, under the standard articulated in Funk, supra (at 507), thus would not be viewed as an official expense of the office. Accordingly, in our view, the cost of medical or health benefits solely for the county clerk cannot lawfully be paid from the fees of the county clerk's office. Funk, supra. And see, OAG 89-51 (copy enclosed).

\*2 Of related interest, see OAG 92-108 (copy enclosed), in which we opined that a legislative enactment now codified as [KRS 61.405](#) is unconstitutional, and see, [KRS 79.080](#).

(2) If coverage has to be offered to the employees of the county fee official, could this requirement be legally waived if the county fee official offers his employees the option of coverage provided by the county government or a pay raise to independently purchase coverage and the employee opts for a pay raise instead of coverage?

In our view the answer to this question is no.

First, the basic statute authorizing cities, counties, urban counties, and agencies thereof, to establish health coverage programs for employees and elected officers ([KRS 79.080](#)) does not provide for a pay raise in lieu of coverage under the governmentally provided program. We believe that where a statute authorizes a particular program, but does not authorize waiver of such program and provision of a pay raise instead, offering a pay raise, rather than the program or plan provided for by statute, is not lawful because such alternative is not statutorily authorized.

Second, if such waiver were allowed, the employees so opting would effectively impose higher costs upon the county or office employing them in the form of social security and retirement costs associated with the pay raise extended to them. In our view this would constitute unequal treatment of employees and would thus be violative of the principle of equal protection of the law called for by section 3 of Kentucky's Constitution.

(3) Can an elected county fee official offer his employees a health insurance benefits plan which provides a different level of coverage than that provided to the county fee official?

In our view the answer is no.

First, as noted above with regard to the "waiver and pay raise option," the basic statute providing for governmentally funded health coverage ([KRS 79.080](#)) for public employees does not provide for one level of coverage for officers, and another for employees. Accordingly, we believe such differing coverage would not be lawful as not authorized by statute.

Second, we cannot envision a reasonable basis for an elected county fee official offering a different level of health coverage for employees than that available to the officer. In our view such different level of coverage would be arbitrary and would involve other than equal treatment of the law and thus would be violative of sections 2 and 3 of Kentucky's Constitution.

Questions Posed by Counsel for Graves County Clerk

(1) Can an elected county fee official provide hospitalization insurance benefits for the elected fee official from excess fees provided that the fee official offers his employee (sic) the same health insurance benefit as the county fee official?

The absence of detailed facts related to this question prevent us from providing a definitive answer, but the likely answer is no, for much the same reasons as discussed above in relation to questions posed by the Auditor's Office.

**\*3** Did the fiscal court approve the expenditure of funds by the clerk to pay the cost of furnishing of health insurance to both the clerk and the employee(s)? What was the exact nature and timing of the offer in question? For example, was there an offer to provide, from the "excess fees" of the office, the same coverage provided to the clerk, to begin at the same time such coverage was instituted for the clerk? We probably would have to know answers to these questions, and perhaps others, in order for us to provide a reasoned and definitive answer to this question, but again, the likely answer is no.

(2) Can the State Auditor disallow in the County Clerk 1992 fee audit the questioned health insurance premium expenditures for calendar years 1988, 1989, 1990 and 1991?

The answer to the specific question posed here is that the state auditor, in what might be termed a "current audit," may disallow credit against the fees of a county clerk's office in prior years for improper expenditures not cited in prior year audits by a private accountant. However, a legal action filed by a fiscal court (see, e.g., [KRS 64.820](#)), to attempt to recover monies said to have been unlawfully expended, will be governed by the general limitation of action statute, [KRS 413.120](#). Basically, this statute provides that an action subject to the statute must be commenced within a five year period after a cause of action accrues. Of course where fraud or mistake is involved, [KRS 413.130](#), which establishes a ten year limitation of action, might be applicable. See [Greenup County v. Millis, Ky., 303 S.W.2d 898 \(1957\)](#), and Opinion of the Attorney General (OAG) 81-293, copies enclosed, which are followed here.

Sincerely,  
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Attorney General

Gerard R. Gerhard  
Assistant Attorney General

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